

Decision 03-01-081 January 30, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of California Water Service Company (U 60 W), a Corporation, for an Order Authorizing It to Increase Rates Charged for Water Service at Each of Its Operating Districts to Recover Increased Operating Expenditures at Its General Office.

Application 01-09-062
(Filed September 10, 2001)

And Related Matters.

Application 01-09-063
Application 01-09-064
Application 01-09-065
Application 01-09-066
Application 01-09-067
Application 01-09-068
Application 01-09-069
Application 01-09-070
Application 01-09-071
Application 01-09-072
Application 01-09-073
Application 01-09-074

INTERIM ORDER GRANTING MOTION AND SETTING BRIEFING SCHEDULE

I. Summary

In this decision, the Commission finds that California Water Service Company (Cal Water) acquired two water systems and failed to obtain required Commission approval of the acquisitions or rates to be charged, thus violating

the Public Utilities Code and Commission decisions. The parties are required to address why Cal Water should not be ordered to (1) disgorge all funds collected for public utility services provided to customers in violation of the Public Utilities Code, and (2) pay fines or incur other penalties for such violations.

II. Background

A. The 1997 Memorandum of Understanding

In 1995, Cal Water filed general rate cases for five of its then-20 operating districts. As part of the processing of those rate cases, Commission staff became aware that Cal Water had acquired four small water systems, all of which were contiguous to Cal Water's service territory. The staff contended that Cal Water should have filed revised service territory maps as required by General Order 96-A prior to filing the rate cases. For this and other ratemaking issues, the staff recommended penalties.

Rather than litigate the issues, Cal Water and staff reached a Memorandum of Understanding (MOU) setting out the specific requirements for Cal Water to follow to obtain approval for a system acquisition. The MOU requirements are set out in Attachment A to today's decision. The Commission approved the MOU in California Water Service Company, 71 CPUC 2d 276 (Decision (D.) 97-03-028).

The MOU specifies the regulatory requirements for Cal Water's acquisition of non-Commission regulated water systems. It sets time limits by which Cal Water must notify the Commission staff of the acquisition as well as the deadline for filing an advice letter requesting formal Commission approval. The MOU also provides for a one-time credit of \$94,329 to the Visalia District

balancing account, and a \$5,671 credit to the Bakersfield District balancing account.

B. The 2001 General Rate Case

This consolidated proceeding addresses applications for rate increases in 15 out of the 24 districts in which Cal Water now provides water service. In reviewing the rate increase applications, the Office of Ratepayer Advocates (ORA) discovered that Cal Water was providing public utility water service in two areas formerly served by mutual water companies but now included as unapproved portions of Cal Water's Salinas district. ORA conducted an investigation and filed a report in March 2002 detailing these results:

Indian Springs Mutual Water Company

On March 12, 1997, Cal Water acquired the potable water system, including all wells, pumps, fixtures, other equipment, and operating easements necessary for serving the Indian Springs and Heritage Park Developments in Monterey County. While not hydraulically connected, the Indian Springs system is adjacent to Cal Water's Salinas district system. Cal Water paid \$128,009 for the system.

As part of the agreement, Cal Water agreed to continue to bill the approximately 175 customers "the monthly flat rate charge of \$22.17 during the first five years after closing." Cal Water agreed to bill this flat rate "irrespective" of whether the County of Monterey ordered all water providers to meter water service. Cal Water has been providing service to the former Indian Springs Mutual Water Company customers and charging the flat rates since March 1997. Cal Water has collected approximately \$230,000 from these customers.

On May 6, 2002, Cal Water filed Advice Letter (AL) 1515¹ in which it sought Commission approval for its acquisition of the Indian Springs system and tariffs for flat rate service. Cal Water included in the advice letter filing the information required by D.97-03-028, and stated that the filing was “in accordance with” that decision. The list of information required by D.97-03-028 is reproduced in Attachment A to today’s decision.

In addition to required information, D.97-03-028 sets time limits for informing Commission staff of the acquisition as well as seeking formal Commission approval of the acquisition and of proposed rates. Pursuant to D.97-03-028, Cal Water was required to inform and, if necessary, meet with Commission staff within five working days of executing the purchase agreement. The advice letter with all the required information must be filed within 30 days of executing the purchase agreement. Thus, Cal Water’s advice letter was due on April 11, 1997, more than five years before it filed AL 1515.

Country Meadows Mutual Water Company

On March 9, 2000, Cal Water acquired the Country Meadows water system, which provides potable water service to 108 residential lots in Monterey County. The Country Meadows system is neither hydraulically connected to nor adjacent to Cal Water’s Salinas district system. Cal Water paid \$10,740.30 for the system. Cal Water agreed to bill customers a flat monthly rate of \$49.00 for the first five years after the acquisition. Cal Water has collected approximately

¹ This advice letter and AL 1514 (the latter of which pertains to the County Meadows requisition discussed below) are pending before the Commission. Any prospective rates to be applied to the Indian Meadows or Country Meadows areas shall be set via the pending advice letters.

\$127,000 from these customers. As required by D.97-03-028, Cal Water's advice letter seeking Commission approval of acquisition and rates to be charged was due on April 10, 2000.

On May 6, 2002, more than two years past the due date, Cal Water filed Advice Letter 1514 in which it sought Commission approval for its acquisition of the Country Meadows system and tariffs for flat rate service. Cal Water included in the advice letter filing the information required by D.97-03-028.

Based on the information contained in the report, ORA filed a motion on March 29, 2002, asking that the Commission open an investigation or issue an order to show cause into these issues. ORA sought refunds to customers and fines or other penalties. ORA also asked that all rates approved in the rate case be subject to refund.

C. Cal Water's Response to ORA's Motion

On April 15, 2002, Cal Water submitted its response to ORA's motion. Cal Water acknowledged its responsibility to notify the Water Division of the acquisitions and to file the advice letters, and stated that it "regretted" that those duties were not timely performed. Cal Water explained that the delay was due to "inadvertent oversight and lack of staffing."

Cal Water also stated its belief that these issues could be resolved through the advice letter process such that ORA's request for an investigation or order to show cause was premature. Cal Water also contended that the motion was a "disproportionate" response to an oversight that is being remedied. Cal Water requested that any process to address this motion not delay the rate case, and that it be offered an opportunity to present evidence. Cal Water also stated

that it has fully incorporated all costs and revenue from these acquisitions in its currently pending Salinas District general rate case.

III. Discussion

A. Violations of The Public Utilities Code

Cal Water has not disputed that it acquired the systems as described above, and that it has obtained neither Commission authorization to serve the areas nor rate approval.

All rates charged by public utilities like Cal Water must be in accordance with schedules approved by and filed with the Commission, and must be kept open for public inspection. § 489.² These requirements serve to enable the Commission and the affected public to ensure that a utility is serving the public at proper rates, without unlawful discrimination, and in all other respects in conformity with provisions of state law. Specifically, all rates charged must be just and reasonable, § 451, and no public utility may “establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect,” § 453. Of special note here, the Commission cannot grant retroactive approval for public utility rates. Merchants’ Traffic Assoc. v. The Atchison, Topeka, and Santa Fe Railway, (1914) 4 C.R.C. 268, 276.

Cal Water stated in a letter to ORA, provided for the record by ORA, that while it has “not filed for approval of these rates and charges,” it “has charged the rates that were in effect at the time of purchase.” As the two systems were nonprofit mutual water companies, the customers must approve all rates.

² All citations are to the Public Utilities Code unless otherwise indicated.

Cal Water stated: “[B]y the nature of this type of organization we assumed that the rates in effect were fair and reasonable.”

In 1999, when considering rules governing the acquisition of small water companies, the Commission addressed this exact issue:

[T]o insure that there is no confusion regarding the ratesetting authorization related to the acquisition of mutual or publicly-owned water systems, we shall clarify the process referenced in Section 4.02 of the proposed settlement agreement. Section 4.02 of the settlement agreement provides:

"The Parties agree that the acquiring utility should be authorized to file an advice letter placing into effect the existing rates of its adjacent or nearby water system, the acquired system's rates, or rates lower than either."

Pursuant to Section 451 of the Public Utilities Code, it is a distinct power and obligation of the Commission to establish just and reasonable rates for services or commodities rendered by a public utility. Accordingly, while utilities may file an advice letter requesting that rates be placed in effect for the acquired utility in the manner provided by Section 4.02 of the proposed settlement agreement, the Commission may or may not find such proposed rates to be reasonable. Therefore, the reasonableness of the rates proposed should be addressed and justified in the advice letter. Furthermore, as anticipated by Section 451 of the Public Utilities Code, the implementation of any rate for an acquired water system shall require individual action by the Commission authorizing said rates either through Commission resolution or decision.

Order Instituting Rulemaking on the Commission's Own Motion to Set Rules and To Provide Guidelines for the Acquisition and Mergers of Water Companies,

D.99-10-064. Thus, Cal Water's proffered explanation is not only at odds with

the plain words of the Public Utilities Code, but also ignores our explicit interpretation of the Code rejecting the very argument Cal Water has presented.

The Public Utilities Code also requires that public utilities comply with Commission decisions:

"Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

Section 702.

In D.97-03-028, the Commission established filing time lines and information requirements for Cal Water's acquisitions of non-Commission regulated water systems. Cal Water has admitted non-compliance with that decision. We cannot grant retroactive approval for these rates, and the fact that the rates were in place prior to the acquisition is of no consequence. Moreover, Cal Water's failure to file the acquisition agreements is a violation of D.97-03-028, and thus § 702 as well. The amounts were collected in violation of §§ 451 and 489, and possibly other, sections of the Public Utilities Code. ORA seeks refunds to customers of all amounts collected in violation of the Public Utilities Code and fines and other penalties.

As set out above, the facts that form the basis for ORA's request for refunds to customers are not in dispute. Cal Water provided public utility service in unauthorized areas and at unapproved rates in violation of the Public Utilities Code. Given these undisputed facts, as well as the Commission's inability to retroactively approve the acquisitions and rates, the Commission

must order Cal Water to disgorge all the illegally obtained funds. Therefore, we will order the parties to address why Cal Water should not be required to refund to customers all amounts collected from customers in the Indian Valley and Country Meadows service areas.

While the record contains the necessary evidence on refunds, ORA has not provided us with a recommended fine or other penalties. We are authorized pursuant to § 2107 to impose a fine of “not less than five hundred dollars (\$500), nor more than twenty thousand dollars (\$20,000) for each offense.” Each day of a continuing offense is considered “a separate and distinct offense,” as provided in § 2108. ORA shall file and serve such recommendations on the schedule set out below.

After ORA files its further remedial recommendations, Cal Water shall file a response. Consistent with Rule 45(g), the moving party, ORA, may file a reply.

B. Need for a Hearing

ORA has alleged and Cal Water has admitted that it has provided public utility service in this State and has charged rates neither filed with nor approved by this Commission. These are the material facts; they are not in dispute. Consequently, there is no reason to hold evidentiary hearings.

We do, however, anticipate substantial dispute over the legal and policy consequences of these facts. We will, therefore, set a briefing schedule:³

³ Such schedule may be changed as needed by the assigned Administrative Law Judge (ALJ).

ORA File and Serve Recommended Fines
And Other Penalties

February 7, 2003

Cal Water File and Serve Response

March 14, 2003

ORA Reply

March 28, 2003

We also anticipate that the parties may wish to offer into evidence factual assertions related to the Commission's guidelines for assessing fines to argue that there were mitigating or aggravating facts. See Principles for Assessing Fines, Appendix A, Section D (2), 84 CPUC 2d 187 (D.98-12-075). To the extent the accuracy of the factual assertions underlying the arguments are disputed by another party, we will entertain a motion for hearings. Based on the current record, however, we do not anticipate such factual disputes. To support all factual assertions in their briefs, parties shall attach to their briefs written statements made under penalty of perjury.

IV. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the rules of Practice and Procedure.

Cal Water and ORA filed comments and reply comments on the draft decision. Cal Water argued that the Commission should reject the draft decision because it has a premature and disproportionate response to the situation. Cal Water also contended that the draft decision's Rule 1 findings should be deleted because Cal Water was not attempting to mislead the Commission when it asserted that the advice letters were filed "in accordance with D.97-03-028." Cal Water explained that the assertion referred to the information requirements of D.97-03-028, and that Cal Water had previously admitted in the record that the

advice letters were untimely. Based on Cal Water's explanation, we have deleted the Rule 1 findings.

ORA generally supported the draft decision but contended that it should be modified to place the burden on Cal Water to demonstrate why it should not be fined the maximum amount permitted by law for its violations of the Public Utilities Code and required to refund all amounts collected from the former Indian Springs and Country Meadows customers. As noted by Cal Water in its reply comments and in today's decision, however, ORA has not yet made its recommendation for fines, and the parties have not briefed the factors for assessing fines. Thus, determining a fine level is premature. As for explicitly placing the burden on Cal Water to show why fines and refunds should not be ordered, the findings, conclusions, and ordering paragraphs make clear what showing is required of the parties.

V. Ex Parte Rule

The issues addressed in this decision are adjudicatory as defined in Rule 5(b). Therefore, ex parte communications in connection with these issues are prohibited. § 1701.2(b); Rule 7(b).

VI. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in these proceedings.

Findings of Fact

1. Cal Water acquired the Indian Springs Mutual Water Company on March 12, 1997, and since that time has provided public utility water service to the former Indian Springs customers. Cal Water has billed approximately 175 customers \$22.17 each per month on a flat rate basis.

2. Cal Water admits that it did not file with the Commission the Indian Springs Mutual Water Company acquisition agreement as required by D.97-03-028.

3. Cal Water admits that it did not have Commission authorization to charge public utility rates to the former Indian Springs customers.

4. Cal Water acquired the Country Meadows Mutual Water Company on March 9, 2000, and since that time has provided public utility water service to the former Country Meadows customers. Cal Water has billed approximately 108 customers \$49.00 each per month on a flat rate basis.

5. Cal Water admits that it did not file with the Commission the Country Meadows Mutual Water Company acquisition agreement as required by D.97-03-028.

6. Cal Water admits that it did not have Commission authorization to charge public utility rates to the former Country Meadows customers.

7. No material facts are in dispute.

Conclusions of Law

1. The Commission adopted a set of filing requirements in D.97-03-028 for Cal Water's acquisition of non-Commission regulated water systems.

2. Cal Water did not comply with those requirements when acquiring Indian Springs and Country Meadows.

3. Section 702 requires that public utilities comply with decisions of the Commission.

4. The Public Utilities Code requires that all rates charged by a public utility must be just and reasonable, as well as filed with and approved by the Commission.

5. The Commission may not retroactively approve rates.

6. All amounts collected by Cal Water from the former Indian Springs and Country Meadows customers were collected in violation of the Public Utilities Code.

7. The parties should address why Cal Water should not be ordered to refund all amounts collected from the former Indian Springs and Country Meadows customers.

8. The parties should address why Cal Water should not be fined for its violations of the Public Utilities Code regarding the amounts collected from the former Indian Springs and Country Meadows customers.

9. ORA should submit its recommended fines and any other penalties.

10. No hearing is necessary.

11. Today's order should be made effective immediately.

INTERIM ORDER

IT IS ORDERED that:

1. The parties shall address why California Water Services Company (Cal Water) should not be required to refund to all former customers of the Indian Springs Mutual Water Company and the Country Meadows Water Company all amounts collected in violation of the Public Utilities Code and Commission decisions.

2. The parties shall address why fines and other penalties should not be imposed on Cal Water for its violations of the Public Utilities Code and Commission rules and decisions.

3. The Office of Ratepayer Advocates shall file and serve its recommendations regarding fines and any other penalties.

4. The parties shall comply with the briefing schedule set above.
5. The preliminary determination of the need for hearing is changed. No hearings are necessary.

This order is effective today.

Dated January 30, 2003, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

Attachment A
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(Advice Letter filing requirements from D.97-03-028)

1. Within 5 working days from the date of an agreement to acquire a non-Commission regulated water system, Cal Water shall contact and if required meet with WD staff to explain the details of the proposed acquisition.

2. Within 30 days from the date of execution of an agreement to acquire a non-Commission regulated water system Cal Water shall file an acquisition advice letter with the WD.

3. The acquisition advice letter shall include, but not be limited to, the following items. Appendices need only be filed with WD, however, the acquisition advice letter should indicate that appendices are available upon request.

A. A copy of the executed purchase agreement. (Appendix)

B. Proposed rates.

Cal Water's established rates may be applicable to the acquired customers, but adequate justification must be provided.

C. A detailed description of water system facilities being acquired, based on the best information available from the acquired water system operator and Cal Water's good faith effort to supplement deficiencies. This should include, but not be limited to, such items as a distribution system map, showing pipe sizes and fire flow and pressure area deficiencies. Acquisition advice letters for water systems which do not meet the minimum design and service standards of General Order (G.O.) 103 shall require Commission action by Resolution.

D. Cal Water's planned water system improvements for the acquisition, including estimated costs and the rate impact on the acquired and existing Cal Water customers.

E. Estimated Summary of Earnings before and after the acquisition both with and without the estimated cost of water system improvements from D. above.

Attachment A
(Page 2)

F. The names and addresses of all utilities, corporations, persons or other entities, whether publicly-or privately-operated, with which the acquisition is likely to compete, and of cities or counties within which service will be rendered.

G. A certification that a copy of the acquisition advice letter has been served upon or mailed to each such entity or person in F. above.

H. A map of suitable scale showing the location of the acquisition and its relation to other public utilities, corporations, persons or entities with which the same is likely to compete. (Appendix)

I. A statement identifying the franchises and such health and safety permits as the appropriate public authorities have required or may require.

J. A detailed statement of the amount and basis of the original cost (estimated if not known) of all plant and of the depreciation reserve and purchase price. The parties understand that the original cost is subject to change after verification of the acquired system's records and facilities.

(End of Attachment A)